COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

9 NORTH WALKER STREET DEVELOPMENT, INC.

v.

REHOBOTH BOARD OF APPEALS

No. 99-03

DECISION ON REMAND

June 28, 2005

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DECISION ON REMAND

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND

On April 7, 1999, the 9 North Walker Street Development, Inc. submitted an application to the Rehoboth Zoning Board of Appeals for a Comprehensive Permit pursuant to G.L. c. 40B, §§ 20-23 to build 44 units of mixed-income affordable ownership housing on Bliss Street in Rehoboth, to be financed under the New England Fund (NEF) of the Federal Home Loan Bank of Boston.[1] The Board's denial of that application was appealed to this Committee. The matter was remanded to the Board, the proposal was reduced to 37 housing

1. As described in more detail in our earlier decision, the entire site is 57 acres, of which about half is wetlands. Thirteen houses are proposed on several acres of upland where the project roadway will enter the site from Bliss Street; the roadway will then cross about 400 feet of wetlands to a slightly larger upland area, where the remainder of the houses would be built. The developed upland area totals about 20 acres. There is also an isolated seven-acre upland area that will be given to the town and remain undeveloped. The site is zoned for residences on 60,000 square-foot lots.

units, and on October 26, 2001 a permit for 16 housing units was granted. See Exh. 8.[2] The developer continued to pursue the appeal, and we issued a decision on June 11, 2003, affirming the Board's decision.

This Committee's decision was appealed to the Superior Court. The Court vacated our decision, ruling that the decision of the Board was a *de facto* denial rather than an approval with conditions. We requested that the Court reconsider its decision since it had not been apprised of our ruling with regard to a *de facto* denial in *Settlers Landing Realty Trust v. Barnstable*, No 01-08 (Mass. Housing Appeals Committee Sep. 22, 2003). The Court granted that request, and has remanded the matter to us "to make the determination as to whether there has been a denial or approval with conditions and thereafter proceed to render a final decision based on the evidence ...." *9 North Walker St. Dev., Inc. v. Commonwealth*, C.A. No. 2003-0767, slip op. at 2-3 (Bristol Super. Ct. ruling May 12, 2005).

II. *DE FACTO* DENIAL

When reviewing a Board's decision to determine whether it is a *de facto* denial, the presiding officer considers whether the decision "manifests a reasonable basis" for the reduction in the size of the proposal.[3] See *Setters Landing Realty Trust*, *supra*, slip op. at 3-4.

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2. References to exhibits are to documents admitted into evidence during the Committee's original hearing in 2002.

3. Since the nature of the Board's decision has significant ramifications in terms of burdens of proof, this issue is normally raised as a preliminary motion and ruled upon by the presiding officer at the beginning of our hearing process. See 760 CMR 30.07(2)(f), 31.06. Therefore, we examine the written decision of the Board without resort to external evidence. In its brief, the Board suggests that in making the determination in this case, we should analyze the full factual record that was developed during the hearing. I decline to do this for two reasons. First, it is the essence of the ruling in *Settlers Landing* that the Board must have a clear justification when it makes its decision and not rely on the possibility of justifying that decision at a later date. Second, in this case, as was

There are a number of parallels between this case and *Settlers Landing*, which was the first case in which we ruled that in certain circumstances a decision that is couched as the grant of a permit must in fact be deemed a denial. In both cases, the first "condition of approval" in the decision was a condition limiting the size of the development to a specified number of units. Also, a prominent local concern raised in each case was wastewater disposal. In *Settlers Landing*, there were specific findings as to the amount of nitrogen loading that would have to be borne by the groundwater, but we found that there was not sufficient logical connection drawn in the decision between this concern (or any other concern) and the elimination of a set number of units.

In the case at hand, the Board's decision makes no attempt to quantify the local concern,[4] but rather states simply that the Board's "conclusion is based upon testimony from its consultant and the Board of Health that on-site private wells will likely become contaminated by on-site wastewater disposal systems proposed for each lot." Exh. 8 (p. 4). This indicates that the Board began its analysis properly—by seeking expert advice on a highly technical issue—and provides support for its belief that the development as proposed included too many housing units. But the decision does not provide any further analysis. In a factual situation such as that presented here, the Board had two logical options. First, based on its consultant's testimony, it could have examined the overall development plan in relation to the site and the scientific standards for wastewater disposal on which the local

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seen in our first decision and will be seen again below, the substantive claims made by the Board regarding well contamination and other issues were never clearly established by the evidence.

4. My discussion will focus on the 150-foot well-to-septic-system separation since that appears to be the most critical local concern. The same analysis would apply to other local concerns, though it was only the 150-foot separation that he Board addressed in great depth.

regulation is based, and then provided an analysis to indicate exactly how many units would need to be removed to meet those standards. Or second, again using its consultant's expertise, it could have considered the specific local regulation (e.g., the 150-foot separation requirement), and either waived it partially[5] or determined whether there was a specific scientific basis for keeping it in place on this site. That is, if its consultant indicated that a reduction of the separation to 140 feet represented a scientifically defensible balancing of local concerns and the regional need for housing, the Board could have imposed that by condition, and left it to the developer to determine what smaller number of houses could be reconfigured in order to comply.

But the Board took neither of these approaches, and instead, apparently arbitrarily, reduced the development to 16 dwellings. Rather than analyzing the developer's proposal in depth and limiting it by conditions based on scientific evidence, the Board instead apparently decided what size proposal *it* would like to see on the site. It states, at the beginning of the introduction to its decision, "in many respects, the Board is re-engineering the plan for the Applicant...." Exh. 8 (p.4). This, however, is not the proper approach. As we have frequently noted, "the board must review the proposal submitted to it, and may not redesign the project from scratch." *CMA, Inc. v. Westborough,* No. 89-25, slip op. at 24 (Mass. Housing Appeals Committee June 25, 1992).

I find that the October 26, 2001 decision of the Board, though couched as a grant of a comprehensive permit with conditions, failed to articulate a reasonable basis for the reduction of the development from 37 to 16 units, and it therefore should in fact be deemed a

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5. This is what the Board quite properly did with regard to several zoning and subdivision requirements. See Exh. 8 (p.3).

denial of the permit.

III. BURDEN OF PROOF ON REMAND

Because I have found that this case involves a denial of a permit, the Committee's analysis of the evidence changes dramatically. That is, the burdens of proof change. In all cases, the ultimate question before the Committee is whether the decision of the Board is consistent with local needs. 760 CMR 31.05. But when a permit has been granted with conditions, the initial burden is upon the developer to show that the conditions render the proposal uneconomic. 760 CMR 31.06(3). When a permit has been denied, the developer may establish a prima *facie case* by showing that its proposal complies with state and federal requirements or other generally recognized design standards. 760 CMR 31.06(2). The burden then shifts to the Board to prove first, that there is a valid health, safety, environmental, or other local concern that supports the denial, and second, that such concern outweighs the regional need for housing. 760 CMR 31.06(6); also see *Hanover v. Housing Appeals Committee,* 363 Mass. 339, 365, 294 N.E.2d 393, 412 (1973); *Hamilton Housing Authority v. Hamilton,* No. 86-21, slip op. at 11 (Mass. Housing Appeals Committee Dec. 15, 1988).

In our initial decision of June 11, 2003, in which we viewed the Board's decision as the grant of a comprehensive permit, we found that the developer had not sustained its burden of proving that the conditions imposed made construction of the development uneconomic. See 760 CMR 31.06(3). Because of that, as we noted in our decision, there was no need for us to go further and consider whether there was a valid health, safety, environmental, or other local concern to support teach of the conditions. Nevertheless, we

indicated that there were only three significant issues raised in the hearing, and *in dictum* we addressed each of them. That discussion provides guidance as to how those issues should be decided now that the case has been remanded to us by the Superior Court. I will consider each of them, in the order in which they were addressed in our 2003 decision.

IV. LOCAL CONCERNS

A. Stormwater

As noted in our earlier decision, the developer not only committed to complying with the state Department of Environmental Protection (DEP) Stormwater Management Policy (which is enforced under the Wetlands Protection Act, G.L. c. 131, § 40), but also introduced specific evidence of how the system will comply. Tr. II, 15-39, 79-84.

If there were local stormwater requirements from which the developer were requesting a waiver, the developer's proof would be sufficient to establish its *prima facie* case pursuant to 760 CMR 31.06(2). But logically, the Board should not be permitted to inquire into an issue or place restrictions on affordable housing if the town has not previously regulated the matter in question. See *Walega v. Acushnet*, No. 89-17, slip op. at 6, n. 4 (Mass. Housing Appeals Committee Nov. 14, 1990); *Sheridan Development Co. v. Tewksbury*, No. 89-46, slip op. 4, n. 3 (Mass. Housing Appeals Committee Jan. 16, 1991). Since there was no evidence of a local wetlands bylaw or that Rehoboth has enacted stormwater requirements that would apply to market-rate development of this site,[6] to allow the town to regulate such issues for this development would violate the Comprehensive

6. The Board's expert witnesses acknowledged that the concerns they raised were raised under state law and procedure. See, e.g., Tr. III, 49-50, 99, 103.

Permit Law's provision that local "requirements and regulations are [to be] applied as equally as possible to both subsidized and unsubsidized housing." G.L. c. 40B, § 20.

The Committee has made exceptions to this general rule, but it cannot be argued here, as in our *North Attleborough* and *Hopedale* cases, that the proposed development is so different from the housing that would have been permitted under existing zoning that it raises stormwater concerns that were not anticipated by the town. See *Dexter Street, LLC v. N. Attleborough*, No. 00-01, slip op. at 6 (Mass. Housing Appeals Committee Jul. 12, 1990); *Hamlet Development Corp. v. Hopedale,* No. 90-03, slip op. at 15 (Mass. Housing Appeals Committee Jan. 23, 1992). Nor can it be said, as in *Acushnet* and *Hopedale*, that the stormwater issues are not likely to be considered by any other state agency if they are not considered by the Housing Appeals Committee. See *Acushnet, supra,* slip op. at 6, n.4; *Hopedale, supra*, slip op. at 15. On the contrary, this development, like any other affordable housing development proposed under the Comprehensive Permit Law, must comply with the state Wetlands Protection Act (WPA). The developer must apply to the Rehoboth Conservation Commission with regard to WPA issues, and any disputes about compliance will be adjudicated by the state Department of Environmental Protection pursuant to WPA procedures. Currently, on remand, I find that since the Committee's previous decision was clear on this legal point, this issue need not receive further consideration by the full Committee. The Board has not met its burden of proving a local concern that outweighs the regional need for housing.

B. Separation of wells and septic systems

Extensive evidence was also received with regard to the location of wells and septic systems for the proposed houses. But unlike the question of stormwater, there is a local

regulation of the Rehoboth Board of health that is stricter than state law regulating septic systems, that is, than the requirements in 310 CMR 15.000, or "Title 5." Tr. IV, 80; Exh. 12 (p. 2). Specifically, in order to ensure that drinking water would be safe from nitrates leaching into the groundwater from the septic systems, Rehoboth requires 150 feet of separation between wells and septic systems, while Title 5 requires only 100 feet.

The developer introduced adequate evidence to establish that the proposal will comply with state Title 5 requirements, and therefore has established its *prima facie* case. Tr. II, 25-26, 48; also see Tr. 65-7; Exh. 24 (¶ 2.4). Thus, the question to be decided at this juncture is whether the Board introduced sufficient evidence to prove first, that there is a valid local concern that supports the denial of the permit, and second, that such concern outweighs the regional need for housing. 760 CMR 31.06(6). I find that the Committee has answered this question when it addressed the separation of wells and septic systems in its 2003 decision.[7] We stated:[8]

> Certainly, nitrates in wells are a real public health concern. To protect children's health, there is a federal standard for nitrates in drinking water of 10 milligrams per liter (mg/l or ppm). Tr. II, 75-76; IV, 75. There can be little doubt that Rehoboth's 150-foot separation requirement is related to that concern, and thus is legitimate in the most general sense. But the specific question, which would have been before us if the developer had met its burden with regard to economics, is whether the Board proved an actual public health risk with regard to this particular site and design, and whether that legitimate local concern outweighs the regional need for housing. That is, is the 150-foot requirement necessary in the specific factual circumstances presented here, or

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7. Clearly the answer to this question "finally determine[s] the proceeding" here, and thus cannot be answered by the presiding officer alone. 760 CMR 30.09(5)(b). My finding that the full Committee has already answered this question, however, is based both on the analysis that follows and my understandings during the Committee's 2003 deliberations in this case—deliberations in which I participated as chairman of the Committee. Clearly, my analysis will be reviewed by the Superior Court, and if I am incorrect, the matter can be remanded once again for reconsideration of the evidence by the Committee. The Committee's next scheduled meeting is September 20, 2005.

8. This text appears in section IV-B of the Committee's 2003 decision; footnotes have been omitted.

should it be waived?

In addressing this, we note that the 150-foot separation requirement did not establish a nitrate-concentration standard. Thus, we need to refer to the federal standard as a point of reference in determining whether the proposal creates a public health hazard. That is, conceptually, we must assume that in enacting the 150-foot requirement, Rehoboth, after considering the idiosyncrasies of its soils and geology, had made a judgment that in most locations greater separation was required to meet the drinking water purity standard, and not that it had determined that water deemed safe elsewhere is unsafe for its residents. The question before us would have been whether the Board proved that the soils and geology of this particular site is such that the 37-unit design would result in nitrate concentrations greater than the federal standard. If so, we would uphold the condition; if not, we would waive the 150-foot requirement.

The developer's position is that the site is atypical, and that the models that dictate separation of wells and septic systems do not apply. See Tr. II, 55-60. The wells will be "driven to depth of 100 to in excess of 300 feet" into sedimentary bedrock. Tr. II, 56. Credible testimony based upon a written report was received from an experienced geologist that the water drawn from such wells "comes from substantial distances away and not from on site." Tr. II, 57; Exh. 24, 25-A, 25-B, 25-C. Further, there was credible testimony from the same expert that the aggregate nitrogen budget for the site shows that ground water concentrations will actually be less than 5 mg/l. Tr. II, 65; Exh. 24.

The Board challenges these conclusions. Its expert geologist testified, also with the support of written reports and graphics, that "the bedrock fractures are connected to the surface more than they are to areas that are far away from the site," and nitrates could flow directly from septic systems into wells. Tr. IV, 64, 29. In addition, he prepared his own nitrogen budget based on a slightly different analysis of hydrogeologic areas within the site, and determined that groundwater concentrations would range from 11 to 14 mg/l. Tr. IV, 45-46; Exh. 21, 28-31.

At the close of the hearing, neither side had explained the hydrogeology of the site clearly, and equally important, neither was able to convincingly identify errors or incorrect assumptions underlying the other's reasoning. As a result, we cannot confidently draw any conclusion as to how much separation between wells and septic system is necessary on this particular site. But this confusion, particularly in light of the Board's failure to prove what scientific basis may underlie the general town requirement for the 150-foot separation, would make it very difficult for us to conclude that the Board proved a legitimate local concern that outweighs the need for housing—the conclusion necessary to uphold imposition of a requirement stricter than the state, Title-5 requirement for this proposal.

The most relevant parts of this discussion are in the conclusion: "[N]either side ... explained the hydrogeology of the site clearly...." "[W]e cannot confidently draw any conclusion as to how much separation between wells and septic system is necessary on this particular site. But this confusion, particularly in light of the Board's failure to prove what scientific basis may underlie the general town requirement... would make it very difficult for us to conclude that the Board proved a legitimate local concern that outweighs the need for housing...." Because they were acknowledged to be *dictum*, these statements were oblique rather than conclusive. Nevertheless, they include a finding that the Board had failed to prove what scientific basis underlay the town's septic system requirement. The passage makes it clear that the Board, by not developing a sufficient scientific basis for the townwide policy and not having detailed enough data available for this particular site, was unable to quantify any possible environmental damage, and thus did not meet its burden of proving a local concern that outweighs the regional need for housing.

C. Proportion of units to be affordable

There was also a dispute between the developer and the Board as to whether 25% or 30% of the housing units should be reserved as affordable units. In our 2003 decision, we noted that under the New England Fund program, this figure is frequently the subject of negotiation between the developer and the town, and if the parties are unable to agree, it may be established by condition. We then considered the issue in some detail. That entire discussion, however, only makes sense in the context in which a permit has been granted. We have now ruled that the decision was a denial, and therefore any condition imposed is a

nullity.[9] The proposal before us is the developer's proposal, in which 25% of the units are affordable. This is entirely appropriate since, as discussed in our original decision, it is the minimum required under the Comprehensive Permit Law. Thus, the developer has established a *prima facie* case with regard to the percentage of units that will be affordable. We found previously that that "the Board ha[d] not articulated a reasonable factual or legal justification for this condition [requiring greater affordability], and therefore it should be eliminated," and thus, the Board has not proven facts which would establish that there is a local concern that outweighs the regional need for housing.

V. CONCLUSION

Based upon review of the entire record and upon the findings and discussion above, I conclude that the Rehoboth Board of Appeals' denial of a comprehensive permit is not consistent with local needs. The decision of the Board is vacated and the Board is directed to issue a comprehensive permit as provided in the text of this decision and the conditions below.

1. The comprehensive permit shall generally conform to the comprehensive permit filed with the Rehoboth Town Clerk on October 26, 2001 (the 2001 Comprehensive Permit), which is Exhibit 8 in this proceeding. The development, consisting of 37 total units, including 10 affordable units, shall be constructed as shown on drawings by RIM Engineering Co., Inc. dated April 17, 2000, revised October 7, 2001, which are Exhibit 10 in

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9. This issue is presented in a different posture from the stormwater and septic system issues. No conditions were imposed with regard to either of the latter. But evidence concerning them was presented during the hearing in such a way that it can be analyzed under either the burden of proof that applies when a permit is granted or the burden when a permit is denied. And while the

this proceeding.

2. The following conditions imposed in our original decision shall remain in effect:

(a) [deleted]

(b) No further review by the Conservation Commission or other local boards (see, e.g., section D-1(d) of the 2001 Comprehensive Permit) shall be permitted except with regard to issues controlled by state law, e.g., the state Wetlands Protection Act. Also see 760 CMR 31.09.

(c) 25% of the housing units shall be affordable units to be sold to low or moderate income households.

(d) The affordable units shall be sold for $94,500. If, prior to construction, the developer believes that a higher sales price may properly be charged under the requirements of the New England Fund, then, pursuant to the final project approval procedures in 760 CMR 31.09(3),[10] the developer may apply to the Massachusetts Housing Finance Agency (MassHousing) for approval of such higher price. Any such application to MassHousing shall be subject to the payment of such fees as are then in effect.

(e) The Regulatory Agreement, Deed Rider, Monitoring Services Agreement and any related documents shall be reviewed pursuant to the final project approval procedures in 760 CMR 31.09(3), and not by the Board or other town officials or representatives.

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percentage of affordability issue was raised by a condition included in the Board's decision, as we noted in our original decision, the Board "introduced very little evidence in this regard...."

10. With regard to other aspects of final approval, it appears that pursuant to 760 CMR 31.10, recent changes in § 31.09(3) do not apply to the 9 North Walker Street Development, Inc. proposal. How such procedures might or might not be applied, however, was not raised during the hearing, and on such matters we defer to the interpretation of the various relevant state and federal agencies.

(f) In lieu of a subdivision plan, the Board shall, as a ministerial act pursuant to 760 CMR 31.09(3), approve a Comprehensive Permit Plan suitable for recording purposes, and such Plan shall be recorded prior to construction.

3. Because the Housing Appeals Committee has resolved only those issues placed before it by the parties, the comprehensive permit shall be subject to the following further conditions:

(a) All construction shall be in accordance with all presently applicable local zoning and other by-laws except those waived by this decision or in prior proceedings in this case.

(b) All construction shall comply with applicable state laws, and in particular, wetlands crossings and stormwater drainage designs shall be approved under the state Wetlands Protection Act.

(c) The subsidizing agency may impose additional requirements for site and building design so long as they do not result in less protection of local concerns than provided in the original design or by conditions imposed by the Board or this decision.

(d) If anything in this decision should seem to permit the construction or operation of housing in accordance with standards less safe than the applicable building and site plan requirements of the subsidizing agency, the standards of such agency shall control.

(e) No construction shall commence until detailed construction plans and specifications have been reviewed and have received final approval from the

subsidizing agency, until such agency has granted or approved construction financing, and until subsidy funding for the project has been committed.

(f) The Board shall take whatever steps are necessary to insure that a building permit is issued to the applicant, without undue delay, upon presentation of construction plans, which conform to the comprehensive permit and the Massachusetts Uniform Building Code. See 760 CMR 31.09(3).

4. Should the Board fail to carry out this order within thirty days, then pursuant to G.L. c. 40B, § 23 and 760 CMR 31.09(1), this decision shall for all purposes be deemed the action of the Board.

Housing Appeals Committee

Date: June 28, 2005

Werner Lohe, Chairman
Presiding Officer

LPc\r-d